

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

* * * * *

LA PLATA ELECTRIC ASSOCIATION,)	
INC.,)	
)	
COMPLAINANT,)	
)	
V.)	PROCEEDING NO. 19F-_____E
)	
TRI-STATE GENERATION AND)	
TRANSMISSION ASSOCIATION, INC.,)	
)	
RESPONDENT.)	

FORMAL COMPLAINT

Pursuant to Section 40-6-108(1), C.R.S., and 4 C.C.R. 723-1-1302, La Plata Electric Association, Inc. (LPEA), on behalf of itself and its member-owner retail customers, files this Formal Complaint (Complaint) with the Colorado Public Utilities Commission (Commission). LPEA states:

NATURE OF THE PROCEEDING

1. This Complaint is necessitated by Tri-State Generation and Transmission Association, Inc.'s (Tri-State's) ongoing efforts to thwart LPEA's ability to exercise its right under Colorado Public Utilities Law¹ to seek withdrawal from membership in Tri-State on terms and conditions that are just, reasonable, and nondiscriminatory.

¹ Articles 1-7 of Title 40, C.R.S. See § 40-1-101, C.R.S. *et seq.*

2. Tri-State touts “[v]oluntary and open membership” as one of its core principles.²

Its Bylaws provide that a member may withdraw on equitable terms and conditions determined by its Board of Directors, provided that the withdrawing member satisfies its contractual obligations to Tri-State prior to withdrawing.³ But Tri-State’s assurances of voluntary and open membership, and the right to withdraw from Tri-State, are empty promises.

A. *Tri-State Has Blocked LPEA’s Efforts to Exercise Its Lawful Withdrawal Rights—and Now Has Placed a Moratorium on Providing Member Exit Charges Altogether*

3. LPEA, a Tri-State member, has requested an exit charge from Tri-State to withdraw from membership. In making its request, LPEA made clear it understands it will be required to pay an exit charge. LPEA seeks an exit charge that will both fairly satisfy its contractual obligations to Tri-State, and constitute fair withdrawal terms (both for LPEA, and for Tri-State’s remaining members).

4. Tri-State, however, has made it impossible for LPEA to seek to withdraw or to hold Tri-State to its promise of “open and voluntary membership” absent legal recourse. Tri-State has

² See, e.g., *Better Together: 2019 Investor Presentation*, TRI-STATE GENERATION AND TRANSMISSION ASS’N, at 4, <https://www.tristategt.org/sites/tristate/files/PDF/2019%20SEC%20filings/InvestorPresentation-070919.pdf>.

Tri-State also touts “democratic member control” as one of its core principles. *Id.* Tri-State is governed by a Board of Directors. Each of Tri-State’s member cooperatives elects an individual from its own Board of Directors to serve on the Tri-State Board. These individuals are often referred to as “dual directors,” since they serve both on the member Board and the Tri-State Board. Tri-State characterizes this as “democratic” governance. In reality, however, these dual directors are required to represent Tri-State’s interest when sitting on the Tri-State Board, as Tri-State makes clear in regular fiduciary duty presentations to its Board. See excerpt from *Fiduciary Duties of Corporate Directors*, TRI-STATE GENERATION AND TRANSMISSION ASS’N (Dec. 2013) (attached hereto as Attachment A) (“The Board of Directors of a G&T is not a representative democracy where each director’s responsibility is to represent the interest of his or her distribution cooperative.”). If a system’s interests conflict with Tri-State’s interests, then, according to Tri-State, the “dual director” must either recuse from the vote or resign from one or both boards. *Id.* The dual director therefore may not represent and vote their home system’s interest in the *precise situation* when it would be most critical to do so. The notion that these dual directors “represent” their home systems—a common plank in Tri-State’s advocacy platform—is a myth.

³ See generally *Bylaws of Tri-State Generation and Transmission Association, Inc., As Amended and Restated by the Members on April 3, 2019*, TRI-STATE GENERATION AND TRANSMISSION ASS’N, at Article I § 4, <https://www.tristategt.org/sites/tristate/files/PDF/Corporate%20Governance/AmendedRestatedBylaws-040319.pdf> (last visited Nov. 5, 2019) (Tri-State Bylaws) (attached hereto as Attachment B).

a troubling history of impeding its members' rights to withdraw by prescribing outsized exit charges. Here, Tri-State has refused to provide LPEA an exit charge at all.

5. Tri-State initially just pocket vetoed LPEA's request for an exit charge, but followed later by unilaterally imposing a moratorium preventing Tri-State from taking any further efforts related to requested member withdrawal. This Exit Charge Moratorium suspends consideration of and negotiations regarding any full or partial exits by Tri-State member cooperatives, including providing exit charges to requesting members (which Tri-State characterizes as "Make-Whole Numbers" in the moratorium) until the next Tri-State Annual Meeting in April 2020.⁴

6. The Exit Charge Moratorium also suspends Tri-State's willingness to provide so-called "Shopping Letters" to members seeking withdrawal terms, so that those members can at least have preliminary discussions with potential alternative power suppliers. As Tri-State characterizes it, a "Shopping Letter" "authorize[s] the Member System to investigate the cost of obtaining an alternative supply of power in the event that it withdrew from Tri-State."⁵ The not-so-subtle message is that, absent such a "Shopping Letter," such discussions are not "authorized," and Tri-State may purportedly pursue legal action against a member for initiating such preliminary discussions to better understand its alternatives in the marketplace.

⁴ Initial Comments of LPEA, Proceeding No. 19R-0408E (filed Sept. 11, 2019) (attached hereto as Attachment C) (LPEA Comments) (attaching the September 13, 2019 "Make Whole/Shopping Letters" Resolution imposing Tri-State's exit charge moratorium) (Exit Charge Moratorium)).

⁵ See Exit Charge Moratorium.

7. While LPEA received a Shopping Letter before Tri-State imposed the Exit Charge Moratorium, Tri-State has set the Letter to expire on December 31, 2019—making timely action in response to this Complaint all the more urgent.⁶

8. The Exit Charge Moratorium is designed to hold member cooperatives captive, while Tri-State attempts to overhaul its regulatory status to become Federal Energy Regulatory Commission (FERC) rate jurisdictional—in order to eliminate (in Tri-State’s view) any Commission jurisdiction over member withdrawal issues. As LPEA previously noted, it is “extremely concerned about this chain of events and Tri-State’s unilateral assertion that full- and partial-exit discussions can only happen on a timeline of Tri-State’s choosing with a healthy dose of delay.”⁷ While Tri-State dresses up this delay, claiming it is necessary to allow its Contract Committee to ponder different approaches to member contracts and member withdrawals,⁸ it is nothing but Tri-State’s version of the old four corners offense in college basketball. Tri-State is seeking to run out the clock on its members’ ability to obtain withdrawal terms until it has completed its efforts at FERC seeking to undermine Commission jurisdiction over exit charges, detailed below.

B. While Purporting to Unilaterally Freeze LPEA’s Right to Obtain an Exit Charge, Tri-State Is Simultaneously Working to Attempt to Eliminate the Commission’s Jurisdiction Altogether

9. Tri-State continues to work to complete a process to subject itself to FERC rate jurisdiction, which Tri-State asserts will deprive this Commission of its jurisdiction under the Colorado Public Utilities Law to establish just, reasonable and nondiscriminatory exit charges for

⁶ See Letter from Michael S. McInness, CEO, Tri-State, to Michael Dryspring, CEO, LPEA (Jan. 10, 2019) (attached hereto as Attachment D).

⁷ LPEA Comments at 2.

⁸ See Exit Charge Moratorium.

Tri-State members.⁹ Indeed, Tri-State asserts that, notwithstanding that FERC has rejected its filings as deficient, it is *already* FERC jurisdictional.¹⁰ Further, Tri-State asserts that it can, at its sole prerogative, jump in and out of FERC jurisdiction, thereby attempting to evade regulatory oversight altogether.¹¹

10. Tri-State’s efforts to establish FERC rate regulation is an attempt to deprive this Commission of its jurisdiction over Tri-State’s rates, including jurisdiction to determine a just, reasonable and nondiscriminatory exit charge for a withdrawing member—jurisdiction which the Commission recently confirmed in the Delta-Montrose Electric Association (DMEA) exit charge complaint matter.¹²

11. As the Commission held in that DMEA proceeding, Tri-State members like LPEA are entitled to a just, reasonable and nondiscriminatory exit charge, and they are entitled to have this Commission determine that charge pursuant to a formal complaint proceeding.¹³ The

⁹ See, e.g., Tri-State Rate Regulation: Overview of Tri-State’s FERC Regulation Considerations, TRI-STATE GENERATION AND TRANSMISSION ASS’N, at 1 (June 5, 2019) (Tri-State FERC Member Explanation Brief) (attached hereto as Attachment E) (Tri-State explaining to members that, according to Tri-State, “FERC regulation would preempt individual state regulation for generation rates, transmission rates, rate design, *buyout disputes* and all other rate related matters.” (emphasis added)); Motion for Leave to Answer and Answer of Tri-State Generation and Transmission Association, Inc., FERC Docket Nos. ER19-2440-000 *et al.*, at 6 (filed Sept. 20, 2019) (“Tri-State FERC Answer”) (attached hereto as Attachment F) (claiming that “Tri-State is now a FERC jurisdictional public utility under the FPA, depriving [the Colorado] PUC of jurisdiction to exercise its regulatory authority” over Tri-State).

¹⁰ See, e.g., E-mail from Rick Gordon on behalf of Tim Woolley, Assistant General Counsel, Tri-State, to Tri-State Board, (Oct. 4, 2019, 9:33 PM) (attached hereto as Attachment G) (“With the addition of a new, non-utility member, *Tri-State became rate jurisdictional to the Federal Energy Regulatory Commission on September 3rd.*” (emphasis added)); Notice of New Member and Request for Partial Waiver of Tri-State Generation and Transmission Association, Inc., FERC Docket Nos. ER19-2440-000 *et al.*, at 2 (filed Sept. 3, 2019) (“Tri-State FERC New Member Notice”) (attached hereto as Attachment H) (“Mieco’s admission as a Member of Tri-State is effective as of today, September 3, 2019. Accordingly, as of September 3, 2019, Tri-State is a … *subject to [FERC’s] jurisdiction[.]*” (emphasis added)).

¹¹ Tri-State FERC Member Explanation Brief at 2 (“FERC regulation would eliminate state jurisdiction over ‘buyouts’ and eliminate costs of case-by-case opposition to state rate regulation”—but “Tri-State *would always have the option of leaving FERC regulation.*” (emphasis added)).

¹² See generally Proceeding No. 18F-0866E.

¹³ See Proceeding No. 18F-0866E, Decision No. C19-0291-I (mailed Apr. 1, 2019).

Commission should ensure that LPEA has the opportunity assured it by the Colorado Public Utilities Law.

12. Further, on information and belief, Tri-State's effort to subject itself to FERC rate jurisdiction is only the first step. If Tri-State is correct that FERC rate jurisdiction would strip this Commission of its jurisdiction to prescribe a just, reasonable and nondiscriminatory exit charge for a member seeking to withdraw,¹⁴ if and when Tri-State establishes FERC rate jurisdiction, Tri-State will then argue that FERC may not prescribe exit charges for Tri-State members.

C. *Tri-State Has Displayed a Lack of Candor to the Commission, the General Assembly, and Its Own Members—Necessitating This Complaint*

13. Throughout the materials Tri-State generated relating to its intended move to FERC jurisdiction, Tri-State asserts that FERC jurisdiction will preempt state commission “buyout” jurisdiction. In these carefully worded documents, however, Tri-State never acknowledges that FERC itself would then have jurisdiction to prescribe an exit charge for a member. Rather, Tri-State maintains that “any single member or customer would have the right to file a complaint at FERC over any Tri-State rate or proposed rate.”¹⁵ Tri-State conspicuously avoids discussing whether members may bring FERC complaints to determine an appropriate exit charge. Tri-State

¹⁴ LPEA does not agree that this is the necessary result if Tri-State does become FERC rate jurisdictional, but Tri-State has indicated that it believes this to be the case, and indeed, this is one of the primary reasons articulated by Tri-State to create FERC rate jurisdiction through the addition of a new member that would not be a cooperative or public power district. This, according to Tri-State, would eliminate its exemption from FERC rate regulation under the Federal Power Act (FPA). *See* Tri-State FERC Member Explanation Brief at 2.

Under the FPA, wholesale power suppliers are subject to FERC rate jurisdiction, but there is an exception for cooperatives that “receive[] financing under the Rural Electrification Act … or that sell[] less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the forgoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing.” *See generally* 16 U.S.C. § 824(f). Tri-State seeks to become subject to FERC rate jurisdiction by adding a new member such that it would no longer qualify for the exemption.

¹⁵ *See* Press Release, Tri-State Generation and Transmission Association, Inc., Tri-State Board of Directors to Place Cooperative Under FERC Rate Regulation (July 9, 2019) (Tri-State July 2019 Press Release) (attached hereto as Attachment I).

emphasizes that “FERC regulation would eliminate state jurisdiction over ‘buyouts’” while avoiding the topic of whether FERC *itself* would then have such jurisdiction.¹⁶

14. The manner in which Tri-State obtained the ability to add a new class of membership to attempt to create FERC rate jurisdiction also demonstrates Tri-State’s lack of candor in its dealings both with its members, and with regulators like this Commission. The ability to create a new membership class required the amendment of Tri-State’s Bylaws, which can only be accomplished by a vote of Tri-State’s members, as opposed to its Board of Directors.

15. In early 2019 United Power, Inc. (United Power) urged Tri-State to consider amending its Bylaws to allow for new membership classes, so that some members might be able to enter into less than full requirements contracts with Tri-State. At present, all Tri-State members are Class A members, subject to the same requirement to maintain wholesale power supply contracts with Tri-State requiring the member to purchase at least 95 percent of its power supply needs from Tri-State. In other words, these uniform Wholesale Electric Service Contracts (WESCs) between Tri-State and its members are virtual all-requirement contracts. A new class of membership would be necessary to allow for alternatives to the standard all-requirements WESCs, and allowing such alternative classes of membership might have presented an alternative to outright withdrawal from Tri-State for members inclined to seek to withdraw.

16. In March 2019, Tri-State brought to a member vote United Power’s question of amending its Bylaws to allow for the possibility of creating additional classes of membership, presented to members as follows: “Some Members have asked the Board to consider partial-requirements contracts or subscription contracts.”¹⁷ The matter was framed to members on that

¹⁶ Tri-State FERC Member Explanation Brief at 2.

¹⁷ *Proposed Bylaw Changes Questions and Answers*, TRI-STATE GENERATION AND TRANSMISSION ASS’N, at 1 (Mar. 14, 2019) (“Tri-State Proposed Bylaw Changes Q&A”) (attached hereto as Attachment J).

basis, and the membership voted to approve the proposed Bylaws change to allow for new membership classes beyond Class A membership.

17. The materials that Tri-State presented to its members regarding this proposed Bylaws change focused on the issue of allowing for the creation of additional membership classes with alternative power supply contracts, and said almost nothing about FERC jurisdiction, with one exception: the March 2019 Tri-State Proposed Bylaw Changes Q&A asked “[w]ould these changes make Tri-State subject to FERC jurisdiction?”¹⁸

18. Tri-State’s response? “No. However, they would provide the Board the flexibility to seek FERC jurisdiction if the Board determined that was in the best interest of the existing Members. *The Board has no current intention to seek FERC jurisdiction.*”¹⁹

19. Tri-State’s members were told by Tri-State that they were approving the potential to create a new membership class in order to allow for the possibility of different standard contracts, not creating a mechanism to facilitate a move to FERC jurisdiction. Instead, the approval for the creation of a different membership class, which would have allowed concerned members to opt into that alternative membership class, rather than seek to withdraw from Tri-State altogether, served as the vehicle for Tri-State’s efforts to end-run this Commission’s jurisdiction over exit charges. Tri-State is now using this provision to attempt to add a new member class for a member that is not a cooperative or public power district, in order to create FERC rate jurisdiction by eliminating Tri-State’s exemption under the FPA.²⁰

20. In the DMEA proceeding, the Commission questioned Tri-State’s candor as to Tri-State’s intentions relative to the issue of FERC jurisdiction. The General Assembly similarly

¹⁸ *Id.* at 2.

¹⁹ *Id.* (emphasis added).

²⁰ See *supra* note 14.

questioned Tri-State’s candor during the 2019 legislative session.²¹ And Tri-State was equally misleading in its presentation to its own members regarding the real reason for its proposed Bylaws changes.

21. In fact, while Tri-State represented on March 4, 2019 that it had no current intention to seek FERC jurisdiction, by June 2019 it embarked on a hurried process to do precisely that, all while somehow also claiming Tri-State’s Board had “discussed potential FERC jurisdiction *for years.*”²²

22. It is against this backdrop, and viewed within the context of the extreme efforts Tri-State has undertaken to avoid a reckoning on its conduct regarding member withdrawal, that this Commission should consider LPEA’s Complaint. Further, because Tri-State asserts that this Commission will be stripped of its exit charge jurisdiction once Tri-State is FERC jurisdictional,²³ time is of the essence in resolving this matter.

PARTIES AND BACKGROUND

23. LPEA was founded in 1939 as a nonprofit rural electric cooperative providing services to homes and businesses in southwestern Colorado. LPEA serves more than 33,000 individual, families, and business members in La Plata and Archuleta, as well as in segments of Hinsdale, Mineral and San Juan counties.

24. Tri-State is a nonprofit generation and transmission cooperative corporation headquartered in Westminster, Colorado and is a public utility under Colorado law. Tri-State is organized under Colorado law and provides generation and transmission services to member

²¹ See Letter from Colorado General Assembly Leadership to Duane D. Highley, CEO, Tri-State *et al.* (July 3, 2019) (attached hereto as Attachment K).

²² Tri-State July 2019 Press Release at 2 (emphasis added).

²³ See generally *supra* note 14.

cooperatives in Colorado, Wyoming, Nebraska, and New Mexico, including LPEA. While Tri-State recently attempted to purportedly place itself under FERC rate jurisdiction, FERC dismissed Tri-State's filings as deficient in October 2019, not yet reaching the merits of arguments raised by the Commission and other parties challenging Tri-State's filings.²⁴

25. LPEA purchases services from Tri-State pursuant to a WESC that runs through 2050. Each member of Tri-State has an identical WESC, and these contracts provided that the member is required to purchase at least 95 percent of their power from Tri-State under these respective contracts. LPEA passes the costs of Tri-State's services on to their respective member-owners through retail rates.

26. In 2016, a New Mexico-based Tri-State member, Kit Carson Electric Cooperative (Kit Carson), withdrew from Tri-State after paying a \$37 million exit charge.²⁵ Tri-State publicly endorsed that exit charge as "fair" and sufficient to "protect[] the interests of all [Tri-State's remaining] members."²⁶ And in 2019 (effective in 2020), Colorado-based Tri-State member DMEA and Tri-State agreed to an exit by DMEA—though Tri-State has fought to keep DMEA's exit price secret.²⁷

27. Like Kit Carson and DMEA, LPEA seeks an exit charge that will satisfy its obligations related to Tri-State's debts and resources acquired on LPEA's behalf, while at the same

²⁴ See generally 169 FERC ¶ 61,012.

²⁵ See J.R. Logan, *Kit Carson CEO Reyes Says Tri-State Break Has Two Big Advantages*, TAOS NEWS (June 30, 2016), https://www.taosnews.com/stories/kit-carson-ceo-reyes-says-tri-state-break-has-two-big-advantages_23584.

²⁶ Press Release, Tri-State Generation and Transmission Ass'n, Inc., *Tri-State and Kit Carson Electric Cooperative Enter Into Membership Withdrawal Agreement*, (June 27, 2016), <https://www.tristategt.org/content/tri-state-and-kit-carson-electric-cooperative-enter-membership-withdrawal-agreement%20>.

²⁷ See, e.g., Robert Walton, *Tri-State Files for FERC Regulation, Delta-Montrose to Exit in 2020*, UTILITY DIVE (July 24, 2019), <https://www.utilitydive.com/news/tri-state-files-for-ferc-regulation-delta-montrose-to-exit-in-2020/559397/>.

time allowing LPEA to best serve the public good by minimizing its customers' retail rates and maximizing opportunities to transition towards a clean generation mix.

28. On July 2, 2019, LPEA submitted a "Request to Initiate an Exit Charge Calculation" to Tri-State "formally requesting that Tri-State Generation & Transmission calculate a fair exit charge for LPEA and deliver us the results found and the details of how the calculation was carried out."²⁸ From the outset, LPEA has made clear to Tri-State that "[i]f there is any additional information [it] needs ... to assist in this calculation," LPEA is willing to provide the information.²⁹

29. Tri-State has refused to provide LPEA any exit charge figure whatsoever. And, subsequent to LPEA's formal request, Tri-State implemented its express Exit Charge Moratorium—thereby tabling indefinitely any discussion regarding an LPEA exit charge.

30. Tri-State's Exit Charge Moratorium is unjust, unreasonable, and discriminatory and prevents LPEA from potentially exercising its withdrawal rights. LPEA has no recourse, except to this Commission, to establish a just, reasonable and nondiscriminatory exit charge. To be sure, past member experiences suggest that Tri-State's internal withdrawal process would not have produced a fair exit charge for LPEA, but Tri-State has now eliminated even that possibility.

31. Tri-State continues to pursue its efforts to subject itself to FERC rate regulation, which Tri-State claims will strip this Commission of its jurisdiction under the Colorado Public Utilities Law to establish just, reasonable and nondiscriminatory exit charges for Tri-State members.

²⁸ Letter from Bob Lynch, President, LPEA Board of Directors, and Michael Dreysspring, CEO, LPEA, to Duane Highley, CEO, Tri-State, at 2 (July 2, 2019) (LPEA Exit Charge Request Letter) (attached hereto as Attachment L).

²⁹ *Id.* ("If there is any additional information you need from our cooperative to assist in this calculation, please let us know.").

32. LPEA seeks to exercise its right to a just, reasonable, and nondiscriminatory exit charge from Tri-State. But Tri-State's refusal to engage in meaningful process and to provide a figure at all to LPEA reflects discriminatory, and unjust and unreasonable treatment that the Colorado Public Utilities Law exists to remedy.

33. LPEA seeks a just, reasonable and nondiscriminatory exit charge that is fair both to LPEA's member-owners, and to Tri-State's remaining members.

34. Tri-State's "core principle" of "voluntary and open membership," reflected in the withdrawal provisions of the Tri-State Bylaws, is hollow if Tri-State can unilaterally set an exit charge that is unjust, unreasonable, and discriminatory, and thereby prevent a member from withdrawing – which LPEA and other Tri-State members have seen Tri-State do before. It is even more illusory if Tri-State can refuse to provide an exit charge at all, and unilaterally declare a "moratorium" on any further processing of member exit charge requests.

35. LPEA accordingly requests that the Commission: (1) exercise its jurisdiction over Tri-State as a public utility subject to Colorado's Public Utilities Law; (2) investigate Tri-State's refusal to provide an exit charge to LPEA and declare it contrary to Colorado law as unjust, unreasonable, and discriminatory; and (3) exercise its authority to establish an exit charge for LPEA that is just, reasonable, and nondiscriminatory.

JURISDICTION

I. General Jurisdictional Background

36. The Commission has jurisdiction to act on the allegations and claims in this Complaint under Article XXV of the Constitution of the State of Colorado, and under Colorado's Public Utilities Laws.³⁰

³⁰ Article XXV states that "[i]n addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges" of a public utility "is hereby vested in such agency

37. Colorado's Public Utilities Law gives the Commission broad jurisdiction over public utilities like Tri-State. The Commission has the power, authority, and duty "to govern and regulate all rates, charges, and tariffs of every public utility," to "correct abuses" by public utilities, to "prevent unjust discriminations ... in the rates, charges, and tariffs of such public utilities," to "generally supervise and regulate every public utility in this state," and "to do all things" that are "necessary or convenient in the exercise of such powers."³¹

38. The Public Utilities Law also provides that, except as expressly authorized by statute, no regulated public utility "shall make or grant any preference or advantage" or "establish or maintain any unreasonable difference as to rates [or] charges"³² And it gives the Commission expansive authority to prescribe remedies in complaint proceedings such as this. Specifically, Section 40-3-111(1), C.R.S., provides:

Whenever the Commission upon complaint finds that the rates, tolls, fares, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for any service, product, or commodity, or in connection therewith, [...] or that the rules, regulations, practices, or contracts affecting such rates, fares, tolls, rentals, charges, or classifications are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law, [...] the Commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter observed and in force and shall fix the same by order. In making this determination, the Commission may consider [...] any factors which influence an adequate supply of energy, encourage energy conservation, or encourage renewable energy development.³³

of the State of Colorado as the General Assembly shall by law designate. Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado."

³¹ § 40-3-102, C.R.S.

³² § 40-3-106(1)(a), C.R.S.

³³ § 40-3-111(1), C.R.S.

39. Similarly, Section 40-3-111(2)(a), C.R.S. establishes that “[t]he Commission has the power ... upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, contract, or practice, or the entire schedule of rates, fares, tolls, rentals, charges, classifications, rules, contracts, and practices of any public utility; and to establish new rates, fares, tolls, rentals, charges, classifications, rules, contracts, practices, or schedules, in lieu thereof.”³⁴

40. Colorado’s Public Utilities Law applies to Tri-State as a nonprofit generation and transmission cooperative corporation, and prevents it from “establish[ing], charg[ing], or collect[ing] a discriminatory or preferential rate, charge, rule, or regulation” in violation of Sections 40-3-106(1) or 40-3-111, C.R.S.³⁵

II. The Commission’s Previous Exercise of Jurisdiction over Tri-State in Proceeding No. 18F-0866E

41. In Proceeding No. 18F-0866E, the Commission presented its most recent—and most forceful—articulation of why it possesses authority over the exact issues brought forward by LPEA.

42. Specifically, in Decision No. C19-0297I,³⁶ the Commission rejected numerous Tri-State theories contending that the Commission lacks jurisdiction to establish “exit charges.”³⁷ The Commission determined in that Decision that: (1) it possesses subject matter jurisdiction over the setting of exit charges; (2) setting of an exit charge falls within the Commission’s complaint authority; (3) Tri-State’s constitutional attempts to end-run Commission jurisdiction are inadequate; (4) Colorado statute does not divest the Commission of jurisdiction to hear exit charge-related complaints; and (5) discriminatory exit charges such as those Tri-State has historically

³⁴ § 40-3-111(2)(a), C.R.S.

³⁵ § 40-6-111(4)(a), C.R.S.

³⁶ Proceeding No. 18F-0866E, Decision No. C19-0297I (mailed Apr. 1, 2019).

³⁷ *Id.* at 2 ¶ 5.

attempted to set constitute cognizable discrimination claims under the Colorado Public Utilities Law.³⁸

GENERAL ALLEGATIONS

I. Past Withdrawals from Tri-State

43. The equitable member withdrawal provision in Article I, Section 3 of Tri-State’s Bylaws reflects Tri-State’s “core principle” of “voluntary and open membership.”

44. Consistent with this “core principle,” DMEA and Kit Carson both sought to exit the Tri-State system—efforts given effect in 2020 and 2016, respectively. In the latter case, after having initially demanded \$137 million as an exit charge,³⁹ Tri-State calculated and allowed a final \$37 million exit charge⁴⁰ for Kit Carson’s withdrawal. In the case of DMEA, neither the exit charge initially prescribed by Tri-State, nor the ultimate exit charge agreed upon by the parties to settle DMEA’s formal complaint, are public.

45. Notwithstanding its initially prescribed \$137 million exit charge, Tri-State embraced the ultimate \$37 million Kit Carson exit charge as just, reasonable, and nondiscriminatory for Kit Carson and for Tri-State’s other member cooperatives. Tri-State publicly described it as “fair and equitable,” and “protect[ing] the interests of all [Tri-State’s

³⁸ See generally *id.* at 4 ¶ 9–20 ¶ 40.

³⁹ See, e.g., *supra* notes 25–26. With respect to the initial \$137 million exit charge, Kit Carson’s CEO stated that “Tri-State calculated its exit formula by multiplying the annual revenue it collects from Kit Carson and multiplying it by the number of years remaining in the contract, then subtracting Tri-State’s costs.”

⁴⁰ This \$37 million net cash consisted of \$49.5 million as an early termination fee for withdrawing from membership offset by \$12.5 million for the retirement of Kit Carson’s patronage capital. See *Quarterly Report*, TRI-STATE GENERATION AND TRANSMISSION ASS’N, INC., at 8 (Nov. 4, 2016), <https://www.tristategt.org/sites/tristate/files/PDF/2016%20SEC%20filings/10Q-093016.pdf>. Tri-State’s summary of the exit can be found in its 2016 10-K filed with the SEC. *Annual Report (Form 10-K)*, TRI-STATE GENERATION AND TRANSMISSION ASS’N, INC., at 39, 64 (Mar. 10, 2017), available at <https://www.tristategt.org/sites/tristate/files/PDF/2016%20SEC%20filings/10K-EOY-123116.pdf>.

remaining] members.” Tri-State’s board has also approved the terms and exit charge for DMEA’s withdrawal.

46. While Kit Carson and DMEA managed to escape from Tri-State, they did so only after exhaustive efforts to compel Tri-State to provide a fair exit charge. In both cases, following its script, Tri-State initially prescribed outsized, unreasonable exit charges, requiring the member to then work through the Tri-State internal process, to try to obtain a reasonable exit charge figure. Both Kit Carson and DMEA spent years working through the Tri-State process, making almost no headway. Only the potential for regulatory intervention and litigation enabled Kit Carson and DMEA to finally extract themselves from Tri-State. For example, DMEA was only able to negotiate a settlement with Tri-State only after its complaint before this very Commission appeared headed to hearing.

47. However unfair and unsatisfying Tri-State’s internal withdrawal processes may be, here, they are not even applicable based on Tri-State’s refusal to even provide an exit charge to LPEA, and its follow-on Exit Charge Moratorium.

III. Complainant’s Request to the Commission

48. Because Tri-State is a public utility subject to Colorado’s Public Utilities Law, the Commission should exercise its jurisdiction to confirm the unlawfulness of: (1) Tri-State’s position that it can unjustly, unreasonably, and discriminatorily deny an exit charge to LPEA altogether; and (2) Tri-State’s actual refusal to provide LPEA an exit charge. Tri-State may not arbitrarily let some of its member cooperatives withdraw and deny that same opportunity to other members like LPEA.

49. If the Commission determines Tri-State’s conduct is unlawful, LPEA requests the Commission, consistent with its statutory authority and mandate, adjudicate a just, reasonable, and

nondiscriminatory exit charge. Such a request does not require the Commission to apply the Tri-State WESC, Tri-State's Bylaws, or any other Tri-State contract with Complainant. Nor does it require changing any rate Tri-State currently charges its members.

50. LPEA respectfully requests that the Commission fulfill its primary mandate of protecting public utility customers by: (1) exercising jurisdiction over Tri-State as a public utility subject to Colorado's Public Utilities Law; (2) investigating Tri-State's behavior around exit charges and declaring it unjust, unreasonable, and discriminatory; and (3) exercising its statutory authority to establish an exit charge for LPEA that is just, reasonable, and nondiscriminatory.

**FIRST CLAIM: TRI-STATE'S FAILURE TO PROVIDE
A JUST AND REASONABLE EXIT CHARGE FOR LPEA**

51. LPEA incorporates the allegations in the paragraphs above.

52. Sections 40-3-101, 40-3-102, 40-3-111(1), and 40-3-111(2)(a), C.R.S. are each applicable to Tri-State as a public utility subject to the Public Utilities Law. There is no statute, rule, or Commission decision exempting Tri-State from these statutes.

53. An exit charge for LPEA to exit Tri-State is a charge, classification, contract, fare, practice, rate, regulation, rule, schedule, service, or toll.

54. Tri-State's failure to provide any exit charge to LPEA is unjust and unreasonable.

55. Because Tri-State's refusal to provide LPEA an exit charge is not just and reasonable, the Commission has the authority and duty under Colorado's Public Utilities Law to determine an exit charge for LPEA that is just and reasonable.

56. LPEA has standing to bring this claim based upon, without limitation, Section 40-6-108(1)(a), C.R.S., as LPEA is either a corporation, person, civic association, or body politic authorized to bring a complaint against a public utility.

57. LPEA has standing to bring this claim based upon, without limitation, Section 40-6-108(1)(b), C.R.S., as LPEA represents more than 25 end-use customers of Tri-State.

58. LPEA has standing to bring this claim based upon, without limitation, Section 40-6-111(4)(a), C.R.S., as LPEA is either a member of Tri-State, a retail customer of electric cooperatives that are served by Tri-State, or a public utility.

**SECOND CLAIM: TRI-STATE'S FAILURE TO PROVIDE
A NONDISCRIMINATORY EXIT CHARGE TO LPEA**

59. LPEA incorporates the allegations in the paragraphs above.

60. Sections 40-3-106(1) and 40-6-111(4)(a), C.R.S. prohibit public utilities, including nonprofit generation and transmission corporations like Tri-State, from charging rates or establishing charges that are preferential or discriminatory.

61. Sections 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., are each applicable to Tri-State as a public utility subject to the Public Utilities Law. There is no statute, rule, or Commission decision exempting Tri-State from these statutes.

62. An exit charge for LPEA to exit Tri-State is a charge, classification, contract, fare, practice, rate, regulation, rule, schedule, service, or toll.

63. Tri-State has provided exit charges for other members, but refuses to do so for LPEA.

64. Tri-State's differential treatment of LPEA vis-à-vis other Tri-State members represents an unreasonable difference as to rates, charges, services, or facilities between customers, between localities, between any class of service, or in any other respect.

65. Because Tri-State's failure to produce an exit charge for LPEA represents an unreasonable difference as to rates, charges, services, or facilities between customers, between localities, between any class of service, or in any other respect, the Commission has the authority

and duty to determine an exit charge for LPEA that is not discriminatory pursuant to the Public Utilities Law.

66. LPEA has standing to bring this claim based upon, without limitation, Section 40-6-108(1)(a), C.R.S., as LPEA is either a corporation, person, civic association, or body politic authorized to bring a complaint against a public utility.

67. LPEA has standing to bring this claim based upon, without limitation, Section 40-6-108(1)(b), C.R.S., as LPEA represents more than 25 end-use customers of Tri-State.

68. LPEA has standing to bring this claim based upon, without limitation, Section 40-6-111(4)(a), C.R.S., as LPEA is either a member of Tri-State, a retail customer of electric cooperatives that are served by Tri-State, or a public utility.

SERVICE OF DOCUMENTS

LPEA requests that all testimony, discovery, pleadings, and other documents in this proceeding be served on the following:

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RELIEF REQUESTED

LPEA requests that the Commission provide the following relief:

(i) Issue an order pursuant to the Commission's authority under Sections 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., finding that Tri-State's refusal to provide an exit charge to LPEA is unjust and unreasonable;

(ii) Issue an order pursuant to the Commission's authority under Sections 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., finding that Tri-State's refusal to provide an exit charge to LPEA is discriminatory;

(iii) Issue an order pursuant to the Commission's authority under Sections 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., establishing an exit charge for LPEA that is just, reasonable, and nondiscriminatory; and

(iv) Award LPEA such additional or other relief as the Commission deems proper.

Respectfully submitted this 5th day of November 2019.

By: /s/ Matthew S. Larson
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**ATTORNEYS FOR LA PLATA ELECTRIC
ASSOCIATION, INC.**

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November 2019, a copy of the foregoing **FORMAL COMPLAINT** was filed with the Colorado Public Utilities Commission via e-file and a copy was served via e-mail to the following:

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/s/ Kristin Lewis
Kristin Lewis